girlfriend knew of his injuries and could have filed a claim on his behalf within the limitation period: "To hold as the government requests would penalize [the plaintiff] for the inaction of his family and his girlfriend when he was unable to act." *Id.* at 979. Instead, the court held that the FTCA's statute of limitations began to run after a guardian was appointed. *Id.* Only then did a person with "requisite knowledge of his injury [have] a legal duty to act for him." *Id.*

The Ninth Circuit considered a similar case in *Washington v. United States*, 769 F.2d 1436 (9th Cir. 1985). The plaintiff there lapsed into a coma after Air Force physicians injected her with a spinal anesthetic. She remained comatose until her death fourteen years later. *Id.* at 1437. After she passed away, her husband and children filed administrative claims followed by a federal lawsuit. *Id.* The court of appeals found that the claim did not accrue until the plaintiff's death, reasoning that "[s]he was never aware of her injury or its cause" and that "[n]o one had the duty to bring an action on her behalf." *Id.* at 1439. Accordingly, the court held that the family's claims were timely under § 2401(b). *Id.*

Malinka Wilson's circumstances mirror those of the comatose claimants in *Clifford* and *Washington*, and the court of appeals should have applied the "blameless ignorance" doctrine in this case. Malinka, who suffered serious neurological injuries during labor and delivery, remains unaware of her condition. Until Veronica became an adult, she lacked the ability to protect Malinka's interests. Yet the court found the "blameless ignorance" doctrine inapplicable because Malinka's mother "knew of the alleged injuries and cause by January 19, 2000" even though she "was an 'infant' who could not herself

commence a civil suit" until October 3, 2000. *Wilson*, 403 F.3d at 527. The court then concluded that "[i]nfancy did not prevent Wilson from making an administrative claim." *Id.*

A plaintiff's minority generally does not toll the FTCA's statute of limitations. *See, e.g., McCall v. United States*, 310 F.3d 984, 986 (7th Cir. 2002). Courts justify running the statute of limitations during minority based on the availability of a child's parents or guardian to protect the child's interests. *See Crawford v. United States*, 796 F.2d 924 (7th Cir. 1986) (explaining that "[t]he cases that hold that infancy does not toll the administrative statute of limitations imply that a parent is an adequate surrogate"); *Landreth v. United States*, 850 F.2d 532 (9th Cir. 1988) (stating that "the minor's parents have a legal duty to take action on the child's behalf"). Once a parent or guardian has knowledge of the child's injury and its cause, that knowledge is imputed to the child and the statute of limitations begins to run on the child's claim. *Landreth*, 850 F.2d at 534.

Those cases are distinguishable because they involve minors with adult parents or an appointed guardian. The very justification for running the statute of limitations during a child's minority – that a parent or guardian is capable of protecting the child's interest – fairly demands that a different rule apply when a minor lacks an adult parent or guardian to assert and protect the child's claim. The rationale for imputing an adult parent's knowledge to a minor child has no application when the parent is also a minor without legal power or duty to act on the child's behalf.

Malinka Wilson's circumstances illustrate why the FTCA statute of limitations should not commence until a child has a parent or guardian with the legal capacity to assert the child's claim. When Malinka was born, Veronica was herself a child. Under Missouri law, until she turned eighteen, Veronica could not commence a lawsuit on her own behalf or on behalf of her infant daughter. MO. REV. STAT. § 507.115 (2000) (stating that "infants" – those under the age of eighteen years – have no capacity to prosecute or defend civil lawsuits). In rejecting an argument that a minor was free to file her own suit, the Supreme Court of Missouri stressed that the argument "plainly ignores the disabilities and limitations that childhood, familial relationships, and our legal system place upon a minor of tender years – who has little if any understanding of the complexities of our legal system." *Strahler v. St. Luke's Hosp.*, 706 S.W.2d 7, 9 (Mo. 1986). Accordingly, Veronica lacked the legal capacity to bring a lawsuit in state court until she turned eighteen.

Veronica had no greater opportunity to pursue her daughter's claim within the federal system. She could not file a federal lawsuit for the same reason that she could not bring a state action: An individual's capacity to sue in federal court is determined by the law of his or her domicile. FED. R. CIV. P. 17(b).

Nor, as the court below opined, could Veronica pursue Malinka's administrative remedy before she turned eighteen. According to the regulations governing the filing of an administrative claim, "[a] claim for personal injury may be presented by the injured person, his duly authorized agent, or legal representative." 28 C.F.R. § 14.3(b) (2000). The Third Circuit has held that because the regulations do not define "legal representative," state law

fills the gap to determine whether an individual qualifies as a claimant's legal representative. *Reo v. United States Postal Serv.*, 98 F.3d 73, 76 (3rd Cir. 1996). If state law applies as the *Reo* court concluded, Veronica could not qualify as Malinka's legal representative under Missouri law until her eighteenth birthday. MO. REV. STAT. § 507.115 (2000). Because the opinion issued by the court below indicates that Veronica could have filed an administrative claim before her eighteenth birthday,[3] it conflicts with *Reo*.

Thus, unlike the typical child plaintiff, Malinka did not have a parent who was chargeable with and capable of acting upon her claim.

No other court of appeals has considered whether the FTCA's statute of limitations runs on a child's claim during the minority of her parents.[4] But courts have expressed their reluctance to foreclose the minor's rights when the adequacy of a minor's representation by a parent or guardian is in doubt.

In *McCall v. United States*, a mother filed a claim with the Department of Health and Human Services four

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[3] The court of appeals also said nothing of Veronica's ability to settle the lawsuit had she in fact filed an administrative claim on behalf of Malinka before her eighteenth birthday. Under Missouri law, a minor cannot provide an insurer a binding release, and a minor's parents and natural guardians, even if they are adults, have no power to execute a release binding on their minor child. *Levin v. State Farm Mut. Auto. Ins. Co.*, 510 S.W.2d 455, 462 (Mo. 1974). Thus, until she turned eighteen, Veronica had no more capacity to resolve her daughter's claim than she had to commence and maintain it.

[4] At least one district court has tolled the FTCA's statute of limitations for the claim of a child whose mother was a minor. *Albright v. Keystone Rural Health Ctr.*, 320 F. Supp.2d 286 (M.D. Pa. 2004).

years after giving birth to her son. 310 F.3d 984 (7th Cir. 2002). She alleged that the government's negligence during her labor and delivery caused permanent brain damage to her son. A year later she and the grandmother and guardian of the child commenced a federal lawsuit against several defendants, including the United States. The government moved to dismiss the case based on the statute of limitations. Although the court of appeals agreed and refused to toll the statute of limitations based on the child's minority, it declined to hold that a child's minority can never toll the statute of limitations:

> We refrain from deciding, however, whether our analysis would be the same if the record affirmatively reflected that the parents had an interest adverse to or that the custodial adult could not be expected to make legal decisions in the best interest of the child. . . . We leave open the question whether the FTCA's statute of limitations would be tolled if a minor lacked adequate means of obtaining judicial relief through either his parents or a guardian.

Id. at 988.

In *Zavala v. United States*, the Ninth Circuit considered the effect of a parent's abandonment of his minor child. 876 F.2d 780 (9th Cir. 1989). The plaintiff's mother in that case had suffered cardiac and respiratory arrest and had been declared brain dead. She was kept on life support to allow her baby additional time to mature *in utero*. In January 1980, shortly after his delivery, the infant was diagnosed with severe brain damage due to oxygen deprivation suffered prior to birth. He went to live with his maternal grandparents after being discharged from the hospital. His father resided with the child and

the grandparents until April 1981. On June 1, 1984, the grandmother filed an administrative claim on the child's behalf. Five weeks later, she was appointed his guardian ad litem. After the federal agency failed to make a final disposition of her claim, she commenced a federal lawsuit on her grandson's behalf. *Id.* at 781-82.

On appeal from the district court's dismissal of the case on statute of limitations grounds, the grandmother argued that the limitations period should have been tolled because the child's father abandoned him. The court did not reject the principle that abandonment could justify tolling but held there was "insufficient evidence of abandonment to create a jury issue." *Id.* at 783 n.3. The record indicated that the father knew the cause of his son's injuries and was not "physically incapacitated or otherwise incapable of filing a claim." *Id.* at 783. And even though the father did not live with his son during the last eight months of the limitations period, he maintained contact with the child's grandmother and knew of his son's condition throughout the limitation period. He also took some financial responsibility for his child. According to the court, the child "had, from the moment his cause of action accrued, a parent who had *both* the duty to bring a claim and the knowledge necessary to pursue it." *Id.* at 784.

Malinka is representative of the group of claimants the *McCall* and *Zavala* courts intended to insulate from their rulings. She "lacked adequate means of obtaining judicial relief through either [her] parents or a guardian." *McCall*, 310 F.3d at 988. Neither did she have "from the moment [her] cause of action accrued, a parent who had both the duty to bring a claim and the knowledge necessary to pursue it." *Zavala*, 876 F.2d at 784. The present opinion nonetheless concludes that the time for asserting

her claim began to run as soon as her underage mother had enough information for a competent person to be held responsible for knowing that a tort had been committed and a cause of action had arisen.

This case invites the Court to clarify the purpose of the FTCA in light of a circumstance that is bound to recur. The next infant plaintiff may have a thirteen-year-old mother, or she may be a sudden orphan. The court of appeals' answer to the question presented – whether FTCA claims of children who lack parents or guardians capable of protecting their legal interests must be filed within two years after the government's negligent conduct – is inconsistent with the remedial purpose of the FTCA. The reasoning of the Court of Appeals is in conflict with the reasoning of analogous cases such as *Clifford, Washington, McCall,* and *Zavala*, and inevitably will be cited as authority for departing from the humane principle established in those decisions.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

MICHAEL A. GROSS*
JOSEPH F. YECKEL
34 N. Brentwood Blvd.
Suite 207
St. Louis, MO 63105
(314) 727-4910

LARRY W. GLENN
WALTHER/GLENN LAW ASSOCIATES
10 S. Brentwood Blvd.
Suite 102
St. Louis, MO 63105
(314) 725-9595

* *Counsel of Record* *Attorneys for Petitioner*

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 03-3830

Malinka Wilson, by and through her next friend and mother, Veronica Wilson,	*	
Appellant,	*	
v.	*	Appeal from the United States District Court for the Eastern District of Missouri.
Delores J. Gunn, M.D.; Joseph B. Shumway, M.D.; Beverly Jean Hoehn, M.D.; Charles Dahm, M.D.; Edie M. Pohl, M.D.; St. Louis University; Tenet Healthsystem DI, Inc., doing business as Forest Park Hospital,	*	
Defendants,	*	
United States of America,	*	
Appellee.	*	

Submitted: February 15, 2005
Filed: April 6, 2005

Before WOLLMAN, McMILLIAN, and BENTON, Circuit Judges.

BENTON, Circuit Judge.

Malinka L. Wilson, by her mother, Veronica D. Wilson, sued the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671 et seq., alleging malpractice by a government-funded physician. The district court[1] granted summary judgment for the government, due to the statute of limitations, 28 U.S.C. § 2401(b). Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

Wilson delivered Malinka on January 17, 2000, at Forest Park Hospital in St. Louis. On January 25, 2002, Wilson sued for medical malpractice in state court, alleging that Malinka suffered serious brain and arm injuries during delivery. On January 28, 2002, Wilson made an administrative claim with the Department of Health and Human Services, stating that at least one physician who treated Malinka was employed by a recipient of federal grant money. Defendant Delores J. Gunn, an employee of People's Health Center, a federally-funded medical facility, removed the case to federal court, where the United States was substituted as a defendant. The district court, concluding that Wilson failed to bring the administrative claim within the two-year statute of limitations of the FTCA, granted summary judgment to the United States. The court rejected Wilson's assertion that the statute was tolled until she turned 18 on October 3, 2000, the age when Wilson could herself bring suit. The district court then remanded other claims to state court.

This court reviews de novo the grant of summary judgment, giving Wilson the most favorable reading of the

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[1] The Honorable Rodney W. Sippel, United States District Judge for the Eastern District of Missouri.

record and the benefit of any reasonable inferences from the record. *See* ***Uhiren v. Bristol-Myers Squibb Co.***, 346 F.3d 824, 827 (8th Cir. 2003). "Summary judgment is appropriate only when the pleadings, depositions and affidavits submitted by the parties indicate no genuine issue of material fact and show that the moving party is entitled to judgment as a matter of law." ***Id.***

Under the FTCA: "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues." **28 U.S.C. § 2401(b).** "This statute is a limitation on the government's waiver of sovereign immunity that must be strictly construed." ***K.E.S. v. United States,*** 38 F.3d 1027, 1029 (8th Cir. 1994), *citing* ***Soriano v. United States,*** 352 U.S. 270, 276 (1957). *See also* ***United States v. Sherwood,*** 312 U.S. 584, 590-91 (1941). Since Wilson's administrative claim was presented on January 28, 2002, it is time-barred if it accrued before January 28, 2000.

"[T]he general rule under the [FTCA] has been that a tort claim accrues at the time of the plaintiff's injury." ***United States v. Kubrick,*** 444 U.S. 111, 120 (1979). However, "if the plaintiff has been in 'blameless ignorance' of the injury, the cause of action does not accrue until the plaintiff knows of the fact of injury and its cause." ***K.E.S.,*** 38 F.3d at 1029, *citing* ***Kubrick,*** 444 U.S. at 120-22 & n.7. *See also* ***Urie v. Thompson,*** 337 U.S. 163, 169-70 (1949). "The cause of action accrues at that time even if plaintiff does not know that the injury is legally redressable – if plaintiff fails to act despite knowledge of the harm and its cause, defendant is entitled to the limitations defense." ***K.E.S.,*** 38 F.3d at 1029.

Infancy does not ordinarily toll the FTCA statute of limitations. ***Clifford v. United States***, 738 F.2d 977, 980 (8th Cir. 1984). *See generally* Romualdo P. Eclavea, Annotation, *Statute of Limitations Under Federal Tort Claims Act*, **29 A.L.R. Fed. 482, § 10(a)** (1976 & Supp. 2004). "When a person is an infant, there are others legally responsible for his or her well-being. The parents or guardians would be under a duty to investigate the injury and its cause, and to take legal action within the time prescribed." ***Clifford***, 738 F.2d at 980. Nonetheless, Wilson argues that because she was an *infant* parent when Malinka was born – with no "legal knowledge" of Malinka's condition or "legal duty" to act on Malinka's behalf – the limitations period should not begin until her eighteenth birthday, October 3, 2000.

Wilson mainly invokes *Clifford*, where a comatose adult's claim did not accrue until a guardian was appointed. ***Id.*** *See also* ***Washington v. United States***, 769 F.2d 1436, 1438-39 (9th Cir. 1985). Before the guardian was appointed, no one who knew of the injury and its cause had a duty to act on Clifford's behalf. ***Clifford***, 738 F.2d at 980. The *Clifford* court explicitly distinguishes cases where the statute ran on infants' claims. ***Id.*** Further, the *Clifford* court limits its holding to "that rare situation where the alleged malpractice itself . . . has prevented the claimant from ever obtaining" the knowledge needed to begin the limitations period. ***Clifford***, 738 F.2d at 980. *See also* ***Zeidler v. United States***, 601 F.2d 527, 531 (10th Cir. 1979).

Here, Malinka's parent and guardian knew of the alleged injuries and cause by January 19, 2000. True, Veronica Wilson was an "infant" who could not herself commence a civil suit from January 19, 2000 to October 2,

2000, by the terms of Mo. Rev. Stat. § 507.115 and Fed. R. Civ. P. 17(b). She emphasizes that infants have "little if any understanding of the complexities of our legal system." *See* ***Strahler v. St. Luke's Hosp.***, 706 S.W.2d 7, 10 (Mo. banc 1986). But the record here shows that she was responsible for Malinka's well-being. Contrary to Wilson's argument, there is no genuine issue of material fact as to when she knew the existence and probable cause of Malinka's injuries. Wilson's sworn deposition statements demonstrate that by January 19, 2000, she knew of Malinka's injuries and believed they would not have occurred if the doctors had performed a cesarean section. Wilson cites general statements of healthcare workers that she had incomplete understanding of Malinka's condition and health needs, but these statements do not contradict her own specific deposition testimony.

Infancy did not prevent Wilson from making an administrative claim. *See* ***Zavala v. United States***, 876 F.2d 780, 784 (9th Cir. 1989), *citing* ***Crawford v. United States***, 796 F.2d 924, 926 (7th Cir. 1986). Because the claim accrued by January 19, 2000, and more than two years passed before the administrative claim was filed, summary judgment is proper.

Wilson further claims that the summary judgment violated Malinka's right to due process under the fifth amendment. Malinka's right to sue under the FTCA is a property interest protected by due process. *See* ***Logan v. Zimmerman Brush Co.***, 455 U.S. 422, 428-29 (1982). A statute "adjusting the burdens and benefits of economic life" violates due process if the claimant establishes "the legislature has acted in an arbitrary and irrational way." ***Honeywell, Inc. v. Minnesota Life and Health Ins. Guar. Assoc.***, 110 F.3d 547, 554 (8th Cir.), *cert. denied,*

522 U.S. 858 (1997), *quoting* ***Usery v. Turner Elkhorn Mining Co.***, 428 U.S. 1, 15 (1976). Wilson states: "Under a statute of limitation that allows for tolling while an adult patient is comatose, there can be no rational explanation for denying infants whose parents are children the right to assert their tort claims against the government." In this case, Wilson had the opportunity to pursue Malinka's administrative claim before the section 2401(b) period expired. All parties agree that after turning 18, Wilson had 15 months to act on behalf of Malinka before the statute of limitations ran. Wilson does not show that Congress acted in an arbitrary and irrational manner.

The judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MALINKA WILSON, by and through her next friend and mother, VERONICA WILSON Plaintiff, vs. UNITED STATES OF AMERICA, et al., Defendants.	)	Case No. 4:02CV1136 RWS

MEMORANDUM AND ORDER

(Filed Jul. 9, 2003)

Plaintiff Malinka Wilson, by and through her mother, Veronica Wilson, brings this negligence action against Joseph Shumway, Beverly Hoehn, Charles Dahm, Saint Louis University, Tenet Healthsystem DI, Inc., and the United States of America.

The United States argues that Plaintiff's complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) for failure to comply with the two year statute of limitations established by the Federal Tort Claims Act. In the alternative, the United States argues that it is entitled to judgment as a matter of law on Plaintiff's complaint.

There is no issue of fact as to whether Malinka Wilson's claim against the United States accrued on January

17, 2000. Veronica Wilson filed this claim on January 28, 2002. Because the two year statute of limitations set by the Federal Tort Claims Act for claims against the United States began to run on January 17, 2000, this claim was untimely filed.

Summary judgment will be granted on Plaintiff's complaint as to the United States.

I. Facts

Veronica Wilson ("Wilson") delivered her daughter, Malinka Wilson ("Malinka") on January 17, 2000 at Forest Park Hospital in St. Louis Missouri. Forest Park Hospital is a non-federally funded medical facility. Wilson had visited the People's Health Center, a federally funded medical facility, beginning on June 16, 1999 for the purpose of receiving prenatal care. On July 7, 1999. Wilson was referred for ultrasound, the results of which indicated that the gestational age of the fetus was approximately twelve weeks. On January 16, 2000, Wilson was admitted to Forest Park Hospital at approximately forty weeks gestation due to contractions. At that time, Wilson denied any complications with the pregnancy.

Wilson claims that Malinka sustained serious, permanent, and painful injuries to her brain and her arm as a result of Defendants' negligence while caring for Wilson's pregnancy and the labor and delivery of Malinka. Wilson argues that Defendants failed to perform an adequate and timely delivery and failed to perform a C-section when they knew or should have known that it was medically necessary to do so.

On January 28, 2002, Wilson, on behalf of Malinka, filed suit in the Circuit Court of the City of Saint Louis against several individual healthcare providers. This action was then removed to the United States District Court for the Eastern District of Missouri. Defendant Delores Gunn filed a motion to dismiss and to substitute the United States of America as a Defendant on November 19, 2002. The Court granted the motion. Wilson filed an amended petition on March 6, 2003 naming as Defendants Shumway, Hoehn, Dahm, Saint Louis University, Tenet, and the United States.

The United States now moves to dismiss this case pursuant to Rule 12(b)(i) or, in the alternative, for summary judgment.

II. Legal Standards

Federal Rule of Civil Procedure 12(b)(1) provides that a claim may be dismissed for lack of jurisdiction over the subject matter. A complaint may be challenged under Rule 12(b)(1) either on its face or on the factual truthfulness of its averments. *Titus v. Sullivan,* 4 F.3d 590, 593 (8th Cir. 1993), citing *Osborn v. United States,* 918 F.2d 724, 729 n.6 (8th Cir. 1990). When challenging a complaint on its face, "all of the factual allegations concerning jurisdiction are presumed to be true and the motion is successful if the plaintiff fails to allege an element necessary for subject matter jurisdiction." *Id.*

The expiration of a statute of limitations is not a jurisdictional bar, but instead constitutes a waivable affirmative defense. *U.S. v. Soriano-Hernandez,* 310 F.3d 1099, 1103 (8th Cir. 2002); *United States v. Gomez,* 38 F.3d 1031, 1033 n. 4 (8th Cir. 1994). Accordingly, the Court will

consider this motion as one for summary judgment under Federal Rule of Civil Procedure 56.

When considering a motion for summary judgment, the Court must determine whether the record when viewed in the light most favorable to the non-moving party, shows any genuine issue of material fact. Fed. R. Civ. P. 56(c). *See, Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby Inc.,* 477 U.S. 242, 249-50 (1986). A party seeking a summary judgment bears the initial burden of informing the court of the basis its motion and identifying those portions of the record, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex,* 477 U.S. at 323. There is, however, no express or implied requirement in Rule 56 that the moving party must support its motion with affidavits or other materials negating the oppositions claim. *Id.* The burden is not on the moving party to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. *Id.* at 325. Instead, "the burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court-that there is an absence of evidence to support the nonmoving party's case." *Id.* As long as the record before the court demonstrated that there is not genuine issue of material fact, summary judgment should be granted. *Id.* at 323.

When faced with a motion for summary judgment meeting the standard set forth above, the non-moving party may not rest upon the mere allegations or denials of its pleadings alone, but most introduce affidavits, depositions, answers to interrogatories, or admissions on file designating *specific facts* showing that there is a genuine

issue of material fact for trial. *Celotex,* 477 U.S. at 324; *Jetton v. McDonnell Douglas, Corp.,* 121 F.3d 423, 427 (8th Cir. 1997); *Noll v. Petrovsky,* 828 F.2d 461, 462 (8th Cir. 1987). Further, a plaintiff facing a motion for summary judgment must designate specific facts showing a genuine issue of material fact on each essential element of his claim. *Id.* In addition, this Court is "not required to speculate on which portion of the record the nonmoving party relies, nor is it obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim." *White v. McDonnell Douglas Corporation,* 904 F.2d 456, 458 (8th Cir. 1990) (quoting *InterRoyal Corporation v. Sponseller,* 889 F.2d 108, 111 (6th Cir.1989)).

III. Discussion

The United States moves for summary judgment on the grounds that Wilson failed to file suit with the appropriate administrative agency within the two year statute of limitations established under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2401(b).

The FTCA creates a limited waiver sovereign immunity, permitting plaintiffs to bring suit against the United States

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the

> claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346.

In order to bring suit against the United States, a plaintiff must first present an administrative claim requesting a sum certain in damages to the appropriate federal agency and the claim must be denied. 28 U.S.C. § 2675(a). Furthermore, the claim must be presented within two years of the alleged injury. Section 2401(b) provides that

> [a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b).

The time at which a claim accrues under the FTCA is a question of federal law. *Brazzell v. United States,* 788 F.2d 1352, 1355 (8th Cir. 1986). Generally, a claim accrues under the FTCA at the time of the plaintiff's injury. *United States v. Kubrick,* 444 U.S. 111, 120 (1979). Claims of medical malpractice, however, accrue when the "plaintiff actually knew, or in the exercise of reasonable diligence should have known, the cause and existence of his injury." *Motley v. United States,* 295 F.3d 820, 822 (8th Cir. 2002), citing *Wehrman v. United States,* 830 F.2d 1480, 1483 (8th Cir. 1987). Knowing the cause and existence of an injury is not the same as knowing that a legal right has been violated. *Motley,* 295 F.3d at 822. Once a plaintiff

knows or should know that he has been injured and who has inflicted the injury, "[t]here are others who can tell him if he has been wronged, and he need only ask." *Id.*, citing *Kubrick*, 444 U.S. at 122.

In this case, it is undisputed that Wilson presented an administrative claim to the appropriate federal agency, the Department of Health and Human Services ("DHHS") and that the claim was denied. The United States argues, however, that Wilson did not present her claim to DHHS within the two year statute of limitations as required by § 2401(b). The United States contends that Wilson's claim accrued on January 17, 2000, but that Wilson did not present an administrative tort claim to DHHS until January 28, 2002. The United States argues that Wilson knew the cause and existence of her daughter's injury on January 17, 2000, the day Malinka was delivered. In support of its argument, the United States points to testimony provided by Wilson during her deposition that she was aware Malinka was injured in some way on the day of the delivery, January 17, 2000. Specifically, Wilson testified that on January 17, 2000, she was aware that something was wrong with Malinka's brain. Wilson also testified that she discovered that Malinka had an arm injury on January 19, 2000. Wilson further testified that on January 17, 2000, she believed that Malinka's injuries could have been prevented if the treating physicians had performed a C-section.

Wilson counters that she did present her claim to DHHS within the two year statute of limitations. Wilson does not contest that she first presented her administrative tort claim to DHHS on January 28, 2002. Wilson maintains, however, that her claim did not accrue until October 3, 2000, the day she turned eighteen, since she

was not legally competent to assert a claim for her daughter as a minor. Wilson admits that the minority of *a plaintiff* does not toll the statute of limitations for claims brought under the FTCA, but argues that the minority of a *plaintiff's parent* does toll the statute of limitations.

The statute of limitations serves the two-fold purpose of protecting "defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence" and "affording plaintiffs what the legislature deems a reasonable time to present their claims." *Kubrick,* 444 U.S. at 117. The statute of limitations requires the reasonably diligent presentation of tort claims. *Wollman v. Gross,* 637 F.2d 544, 549 (8th Cir. 1980). This may require a plaintiff to obtain appropriate legal counsel and together with counsel discover the facts and their possible legal ramifications so as to enable the plaintiff to bring suit within a reasonable time. *Id.*

Federal courts have generally been reluctant to toll the statute of limitations for claims against the federal government owing to considerations of sovereign immunity. *Wilson v. West,* 962 F.Supp. 939, 946 (D.Miss. 1997). Limitations and conditions upon which the government consents to be sued must be strictly observed and exceptions thereto are not to be implied. *Soriano v. United States,* 352 U.S. 270, 276 (1957), citing *United States v. Sherwood,* 312 U.S. 584, 590-591 (1941).

The minority of a plaintiff does not toll the two year statute of limitations for claims brought under the FTCA. *See Mossow by Mossow v. U.S.,* 987 F.2d 1365, 1369 n. 6 (8th Cir. 1993). *See also, Clifford v. United States,* 738 F.2d 977, 980 (8th Cir. 1984) (noting the "well-recognized" rule

that the FTCA's statute of limitations is "not ordinarily tolled for infancy"); *Leonhard v. United States,* 633 F.2d 599, 624 (2nd Cir. 1980) (the two year FTCA statute of limitations period is not tolled by the claimant's minority); *Robbins v. United States,* 624 F.2d 971, 972 (10th Cir.1980) (a claimant's minority does not toll the running of the FTCA's statute of limitations); *McCall ex rel. Estate of Bess v. United States,* 310 F.3d 984, 988 (7th Cir. 2002) (the infancy of a plaintiff does not toll the statute of limitations under the FTCA).

Likewise, the mental incapacity of a plaintiff generally does not toll the FTCA's statute of limitations. *See Lake v. Arnold,* 232 F.3d 360, 371 (3rd Cir. 2000) (mental incompetence is not *per se* a reason to toll the statute of limitations in federal actions); *Casias v. United States,* 532 F.2d 1339, 1342 (10th Cir.1976) (holding that insanity does not toll the statute of limitations under the FTCA).

The bar against tolling the statute of limitations for infant plaintiffs and incapacitated plaintiffs presumes that the plaintiffs parent or guardian will act on his or her behalf in bringing suit. *See Crawford v. U.S.,* 796 F.2d 924, 927 (7th Cir. 1986) (the rule that infancy does not toll the statute of limitations implies that a parent is an adequate surrogate); *Fernandez v. United States,* 673 F.2d 269, 271 (9th Cir. 1982); *MacMillan v. United States,* 46 F.3d 377, 381 (5th Cir.1995) ("[U]nder the FTCA, the limitations period is not tolled during the minority of the putative plaintiff; rather 'his parent's knowledge of the injuries is imputed to him"); *Zavala by Ruiz v. United States,* 876 F.2d 780, 783-84 (9th Cir. 1989) (infancy does not toll the FTCA's statute of limitations because the minor's parent had a duty to act on the minor's behalf); *Barnhart v. United States,* 884 F.2d 295, 299 (7th Cir. 1989) (FTCA's

statute of limitations would not be tolled "[w]here the plaintiff was a minor whose parents had a duty to take the initiative in instituting a legal action"). *See also Clifford,* 738 F.2d at 980 (8th Cir.1984) (FTCA's statute of limitations began running when guardian was appointed for comatose patient); *Lake*, 232 F.3d at 371 ("established procedures for the appointment of guardians afford sufficient protection to individuals who are *non compos mentis* that their claims will be instituted within the permissible period").

To the Court's knowledge, there is no federal precedent for the tolling of the FTCA's statute of limitations in cases involving minor plaintiffs. Federal courts have, however, opted to toll the statute of limitations for incapacitated plaintiffs in a limited number of cases. In *Clifford*, the plaintiff, through his father and guardian, brought suit against the United States under the FTCA alleging that the plaintiff had fallen into a permanent coma as a result of medical malpractice. The Eighth Circuit reversed the district court's grant of summary judgment for the government, finding that the plaintiffs suit was not untimely. Although the plaintiff filed suit more than two years after the time of his injury, the Eighth Circuit found that the statute of limitations did not run during the time the plaintiff was comatose and no guardian had been appointed. *Clifford,* 738 F.2d 977. See also *Lake,* 232 F.3d 360 (limitations period tolled for mentally retarded plaintiff where plaintiff lacked a guardian who could advocate her rights and where guardians themselves caused injury to plaintiff).

Wilson would have the Court apply the holding in *Clifford* to excuse the untimely filing in this case. Wilson points out that under Missouri law, individuals under the

age of eighteen lack the capacity to institute legal proceedings. R.S.Mo. § 507.115; Fed. R. Civ. P. 17(b). Wilson further points out that she was only seventeen years old at the time she delivered Malinka. Wilson argues that because she was legally incompetent to assert a claim on behalf of Malinka until she turned eighteen, Malinka, like the plaintiff in *Clifford,* was without a guardian to assert a claim on her behalf. Wilson maintains that just as the statute of limitations in *Clifford* began to run when a guardian was appointed for the plaintiff, so in this case, the statute of limitations began to run on Wilson's eighteenth birthday, October 3, 2000. Wilson concludes that Malinka's cause of action accrued on October 3, 2000, the day Wilson acquired both legal knowledge of Malinka's condition and the legal duty to act on Malinka's behalf.

Wilson's attempt to apply *Clifford* to this case is unavailing. In *Clifford,* the Eighth Circuit considered whether the statute of limitations should run for a *comatose adult* plaintiff who had not yet been appointed a guardian. In deciding to find an exception to § 2401(b), the court expressly distinguished the facts of *Clifford* from those in which the plaintiff is an infant.

> When a person is an infant, there are others legally responsible for his or her well-being. The parents or guardians would be under a duty to investigate the injury and its cause, and to take legal action within the time prescribed. Allen Clifford had reached the age of majority and had not yet been declared legally incompetent. His case is not like one involving a minor.

Clifford, 738 F.2d at 980 (citations omitted).

Unlike the plaintiff in *Clifford*, Malinka was a minor. As a minor, Malinka was not without a parent or guardian who could have asserted a claim on her behalf.[1] Wilson admitted in her deposition that on January 17, 2000 she knew of Malinka's injuries and believed that the injuries could have been prevented had Malinka been delivered via C-section. Wilson could have prepared her case against Defendants before her eighteenth birthday. The evidence shows that Wilson did, in fact, contract with her attorney for representation as early as May 11, 2000 when she signed an Authorization to Release Medical Records allowing counsel to seek medical records on her behalf.[2]

Moreover, Wilson's mother could have stood in the place of Wilson in bringing suit on behalf of Malinka before October 3, 2000. Wilson's mother, Diane Wilson, was present at Forest Park Hospital when Malinka was born and knew of Malinka's injuries. As the parent of a minor, Diane Wilson had a legal duty to act on behalf of Wilson in asserting a claim for Malinka.

Case law both within and without the Eighth Circuit uniformly holds that the statute of limitations under the FTCA does not toll during the infancy of the plaintiff. In the absence of either controlling or persuasive authority that the legal infancy of a plaintiff's mother tolls the statute of limitations under the FTCA, the Court will not

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[1] There is no evidence that Corey Exum, Malinka's father, knew the cause or existence of Malinka's injuries such that he could have asserted a claim on her behalf.

[2] A minor parent is legally competent under Missouri law to enter into a contract for surgical, medical, or other treatment or procedures on behalf of her child. R.S.Mo. § 431.065.

imply an exception to the express statutory limitations to suits against the federal government.

Wilson maintains that if § 2401(b) does not permit an exception to the statute of limitations for cases involving minor plaintiffs whose natural guardians are themselves minors, the Court should find the statute unconstitutional. Wilson argues that allowing the statute of limitations to run before she was legally competent to assert a claim on Malinka's behalf deprives Malinka of her property interests under the FTCA without due process of law.

The Court finds that § 2401(b) is not unconstitutional for failing to provide for tolling where the parent of a minor plaintiff is herself a minor. The Court does not dispute that a cause of action constitutes a protected property interest within the meaning of the Fifth and Fourteenth Amendments. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). The Court does, however, dispute Wilson's contention that Malinka was deprived of her right to bring a cause of action in this Court by the running of the statute of limitations.

Due process, at a minimum, requires that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.*, citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). In this case, dismissal of Malinka's claim was proceeded by notice and opportunity for hearing as provided by the FTCA.

As stated above, Malinka's grandmother, Diane Wilson, was legally competent to assert a claim on Malinka's behalf and knew of Malinka's injuries at the time of her birth. Furthermore, although Wilson was not legally competent to file suit until October 3, 2000, she could have

taken – and did take – steps to prepare a cause of action on Malinka's behalf as soon as she became aware of Malinka's injuries on January 17, 2000. By January 17, 2000, Wilson knew the cause and existence of Malinka's injuries, the name of the facility at which she had received prenatal care, the names of the treating physicians, and believed that a C-section should have been performed.

Wilson had both notice and opportunity within the two year period established by § 2401(b) to file a medical malpractice claim on Malinka's behalf. The Court finds that Malinka's due process rights were not infringed by the running of the statute of limitations. The two year statute of limitations provided Wilson a reasonable time to present the medical malpractice claim on Malinka's behalf. Moreover, there is no evidence that Wilson was not legally competent under Missouri law to file an administrative tort claim before turning eighteen. Had Wilson filed an administrative tort claim by January 17, 2000, Malinka's medical malpractice claim under the FTCA would have been preserved.

Alternatively, Wilson argues that her claim did not accrue until sometime in February 2000 when a social worker at Rankin Jordan Pediatric Rehabilitation Center advised her to seek the advice of an attorney. Wilson contends that issues of fact exist as to whether she, in fact, knew the cause and existence of Malinka's injuries on January 17, 2000. Wilson points out that she was only seventeen years old at the time of delivery, that she was in an unfamiliar place, and that the delivery was difficult and traumatic. Wilson further argues that testimony provided by doctors, a social worker, and a nurse shows that she was not aware of Malinka's condition until February, 2000. One doctor testified that Wilson told her

on January 18, 2000 that Malinka was "doing well." The social worker noted on January 26, 2000 that although Wilson had been informed of Malinka's condition several times, she "does not seem to understand this information." Finally, a nurse's note written three days after Wilson was discharged from Rankin Jordan recorded that Wilson had called to inquire whether she could substitute water for Malinka's nutritional formula.

The evidence submitted by Wilson in support of her argument that Malinka's claim did not accrue until February, 2000 does not suffice to create an issue of fact regarding when Wilson knew the cause and existence of Malinka's injuries. The challenging circumstances of Wilson's labor and delivery have no bearing on when Wilson became aware of her daughter's injuries. Moreover, the testimony of the doctors, social worker, and nurse does not contradict Wilson's sworn deposition statements that she knew the cause and existence of Malinka's injuries on January 17, 2000. At most, the testimony suggests that Wilson might not have know the exact nature and full extent of Malinka's injuries on January 17, 2000. Cited more fully, the social worker's note of January 26, 2000 stated that Wilson "admitted to not completely understanding [Malinka's] condition[,] but is aware that there may be learning problems, walking, eating problems."

In order for a claim to have accrued under the FTCA, a plaintiff need not know the full extent of the damages or that the injury was caused by the government's negligence. *Kubrick,* 444 U.S. at 123. *See Coleman v. Morall,* 2003 WL 1788007, 4 (10th Cir. 2003) (plaintiff need not know the full extent of his injuries before the statute of limitations under the FTCA begins to run); *Massey v. U.S.,* 312 F.3d 272, 278 (7th Cir. 2002) (the statute of limitations

begins to run upon the discovery of the injury, even if the full extent of the injury is not discovered until much later); *Gonzalez v. U.S.*, 284 F.3d 281, 289 (1st Cir. 2001) (plaintiff need not know the full extent of the injury for the statute of limitations to begin to run); *Ashley v. United States*, 413 F.2d 490, 493 (9th Cir.1969) (a claim under the FTCA does not wait to accrue until a party knows the precise extent of an injury).

There are no issues of fact as to whether Wilson was aware at least to some extent of Malinka's condition on January 17, 2000. Because Wilson knew the cause and existence of Malinka's injuries on January 17, 2000, Malinka's claim accrued on that date and the statute of limitations began to run. Wilson filed this claim on January 28, 2002, eleven days after the expiration of the two year limitations period. As such, Wilson's claim is untimely according to the statutory requirements of the FTCA.

Summary judgment will be granted on Wilson's claim against the United States.

IV. Conclusion

There are no issues of fact as to whether Wilson knew the cause and injury of Malinka's injuries on January 17, 2000. Because Malinka's claim accrued on January 17, 2000, the statute of limitations began to run on that date. Wilson did not file this claim until January 28, 2002, eleven days after the expiration of the limitations period. The United States is entitled to judgment as a matter of law on Wilson's claim brought on behalf of Malinka.

Accordingly,

IT IS HEREBY ORDERED that the United States's Motion to Dismiss or in the Alternative for Summary Judgment [#25] is **GRANTED**.

/s/ Rodney W. Sippel
RODNEY W. SIPPEL
UNITED STATES DISTRICT JUDGE

Dated this 9th day of *July,* 2003.

APPENDIX C

1. Section 2401(b) of Title 28 of the United States Code (2000) provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

2. Section 14.3(b) of Title 28 of the Code of Federal Regulations (2000) provides:

> A claim for personal injury may be presented by the injured person, his duly authorized agent, or legal representative.

3. Rule 17(b) of the Federal Rules of Civil Procedure (2000) provides:

> The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. . . .

4. Section 507.115 of the Missouri Revised Statutes (2000) provides:

> As used in sections 507.110 to 507.220, the term "infant" means any person who has not attained the age of eighteen years. All persons of the age of eighteen years or older, not otherwise disqualified, may commence, prosecute, or defend any action in his own name as the real party in interest.